Raja Segaran a/l S Krishnan v Malaysian Bar

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S3(S2)–23–33 OF 2000
MOHD HISHAMUDIN J
17 JUNE 2008

Civil Procedure — Locus standi — Declaratory relief — Plaintiff's action for certain declaratory relief — Plaintiff failing to show he suffered genuine grievance — Whether plaintiff had locus standi to maintain action

Constitutional Law — Judiciary — Conduct of judges — Prohibitions and restrictions on discussions concerning conduct of judges — Whether only Parliament could discuss such conduct — Articles 125 and 127 of the Federal Constitution — Scope and nature of — Whether meant to preserve fundamental constitutional principle of independence of the Judiciary and doctrine of separation of powers

Legal Profession — Malaysian Bar — Action against — Action brought by member of Malaysian Bar — Whether mere fact that plaintiff a member of the Bar sufficient to establish locus standi to commence action

Several bold comments were made by the then Malaysian Law Minister in an Australian radio interview on 30 May 2000, concerning the improper behaviour of the then Chief Justice, photographed holidaying in New Zealand with a senior Malaysian lawyer. The comments, mildly put, raised a storm of protests and resulted in heated exchanges between the Law Minister and Chief Justice, recorded for posterity by all major media. On 7 June 2000, the Executive Committee of the Bar Council met and decided to recommend that an extraordinary general meeting ('EGM') of the Malaysian Bar be convened as soon as possible to deliberate and pass certain resolutions on matters relating to the allegations made by the Law Minister. Following a public statement made by the then Bar Council Chairman, the Secretary of the Bar Council issued a formal notice dated 13 June 2000 to all members of the Malaysian Bar to convene an extraordinary general meeting of the Malaysian Bar to consider the proposed resolutions. The plaintiff, a member of the Malaysian Bar applied for an interim injunction to restrain the Malaysian Bar from holding the extraordinary general meeting on 23 June 2000. The High Court granted the interim injunction. The Malaysian Bar

appealed to the Court of Appeal which dismissed the appeal. The plaintiff also filed the present civil action seeking various declarations. However, the plaintiff did not testify at the trial and was absent throughout the entire trial. He also failed to call any witness to give evidence on his behalf. Counsel for the Malaysian Bar submitted that the plaintiff did not have the locus standi to commence the present action against the Malaysian Bar. Counsel contended that the plaintiff had not offered any evidence to explain his interest in the present proceedings, in particular, to give evidence pertaining to the special damage that he would have incurred if the Malaysian Bar were to be allowed to proceed with the intended EGM. Counsel for the plaintiff however contended that the plaintiff, possessed the requisite locus standi.

Held, dismissing the action with costs:

(1) The plaintiff had clearly failed to show that he had the locus standi to commence the action against the Malaysian Bar. The plaintiff failed to come forward to testify or to offer any evidence at all. The legal burden was on the plaintiff to show that he had the locus standi. As a first step towards establishing locus standi, the plaintiff had to show that he was aggrieved by the decision of the Bar Council to call for the EGM and that the grievance constituted a 'genuine grievance'; ie he would suffer special damage if the EGM were to have taken place (see para 52).

(2) The plaintiff's statement of agreed fact that he was a member of the Malaysian Bar, by itself did not explain why he was aggrieved with what the Bar Council had done or intended to do. Such statement could not help him in terms of establishing locus standi (see para 52).

(3) The court would strongly disagree with the judgments of the Court of Appeal in *Majlis Peguam Malaysia dan 2 yang lain lwn Raja Segaran a/l S Krishnan* (Rayuan Sivil No W-02–47 Tahun 2000; Rayuan Sivil No W-02–48 Tahun 2000) and *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 that ruled that the intended EGM of the Malaysian Bar would be contrary to arts 125 and 127 of the Federal Constitution, and that only Parliament could discuss the conduct of a judge. Article 127 merely provides that Parliament cannot discuss the conduct of a judge except on a substantive motion and subject to certain procedural requirements as to the giving of notice; and that the conduct of a judge cannot be discussed by any State Legislative Assembly. Article 127 imposes a restriction on Parliament and a prohibition on State Legislatures with regard to the power to discuss the conduct of judges. It is the Federal and the State Legislatures that the article was concerned with. The restriction or the prohibition is not imposed upon the general public. With regard to art 125, the

article has nothing to do with the right or power to discuss the conduct of judges either by the legislatures or by the general public (see paras 57–58 & 65–66).

(4) Articles 125 and 127 are meant to protect and preserve the fundamental constitutional principle of the independence of the judiciary and the doctrine of separation of powers to which the Malaysia Constitution subscribes (see para 67).

[Bahasa Malaysia summary

Beberapa komen berani telah dibuat oleh Menteri Undang-Undang Malaysia pada masa itu dalam sebuah temu duga radio pada 30 Mei 2000, berkaitan kelakuan salah Ketua Hakim Negara pada masa itu, yang telah diambil gambar bercuti di New Zealand bersama seorang peguam kanan Malaysia. Komen-komen tersebut, pendek kata, telah menimbulkan pelbagai bantahan dan mengakibatkan perbalahan hebat antara Menteri Undang-Undang dan Ketua Hakim Negara, yang telah dilaporkan oleh semua akhbar utama. Pada 7 Jun 2000, Jawatankuasa Eksekutif Majlis Peguam telah bertemu dan membuat keputusan untuk menyarankan agar mesyuarat agung luar biasa ('EGM') Majlis Peguam diadakan dengan segera bagi mempertimbangkan dan meluluskan resolusi-resolusi tertentu berhubung perkara-perkara berkaitan dakwaan-dakwaan yang dibuat oleh Menteri Undang-Undang. Berikutan kenyataan awam yang dibuat oleh Pengerusi Majlis Peguam, Setiausaha Majlis Peguam telah mengeluarkan notis rasmi bertarikh 13 Jun 2000 kepada semua ahli Majlis Peguam Malaysia untuk diadakan mesyuarat agung luar biasa Majlis Peguam Malaysia bagi mempertimbangkan resolusi-resolusi yang dicadangkan. Plaintif, ahli Majlis Peguam Malaysia telah memohon injunksi interim untuk menghalang Majlis Peguam Malaysia daripada mengadakan mesyuarat agung luar biasa tersebut pada 23 Jun 2000. Mahkamah Tinggi telah memberikan injunksi interim tersebut. Majlis Peguam Malaysia telah merayu ke Mahkamah Rayuan yang telah menolak rayuan tersebut. Plaintif juga telah memfailkan tindakan sivil ini memohon pelbagai deklarasi. Walau bagaimanapun, plaintif tidak memberikan keterangan semasa perbicaraan dan tidak hadir sepanjang keseluruhan perbicaraan. Dia juga gagal untuk memanggil saksi untuk memberikan keterangan bagi pihaknya. Peguam bagi pihak Majlis Peguam Malaysia menghujahkan bahawa plaintif tidak mempunyai locus standi untuk memulakan tindakan ini terhadap Majlis Peguam Malaysia. Peguam menegaskan bahawa plaintif tidak mengemukakan apa-apa keterangan untuk menjelaskan kepentingannya dalam prosiding ini, khususnya, untuk memberikan keterangan berkaitan ganti rugi khas yang mungkin ditanggungnya jika Majlis Peguam Malaysia dibenarkan meneruskan EGM

yang dicadangkan itu. Peguam bagi pihak plaintif walau bagaimanapun menegaskan bahawa plaintif, mempunyai locus standi yang diperlukan.

Diputuskan, menolak tindakan dengan kos:

(1) Plaintif jelas telah gagal untuk menunjukkan bahawa dia mempunyai locus standi untuk memulakan tindakan terhadap Majlis Peguam Malaysia. Plaintif telah gagal untuk ke hadapan memberikan keterangan atau mengemukakan apa-apa keterangan langsung. Beban perundangan terletak atas plaintif untuk menunjukkan bahawa dia mempunyai locus standi. Sebagai langkah pertama untuk membuktikan locus standi, plaintif perlu menunjukkan bahawa dia terkilan dengan keputusan Majlis Peguam untuk mengadakan EGM dan bahawa kilanan itu membentuk 'genuine grievance', iaitu dia akan mengalami kerugian khas jika EGM itu diadakan (lihat perenggan 52).

(2) Kenyataan plaintif terhadap fakta yang dipersetujui bahawa dia merupakan ahli Majlis Peguam, dengan sendirinya tidak menjelaskan mengapa dia terkilan dengan apa yang Majlis Peguam telah lakukan atau berhasrat untuk melakukan. Kenyataan sedemikian tidak membantunya untuk membuktikan locus standi (lihat perenggan 52).

(3) Mahkamah berkeras membantah keputusan-keputusan Mahkamah Rayuan dalam *Majlis Peguam Malaysia dan 2 yang lain lwn Raja Segaran a/l S Krishnan* (Rayuan Sivil No W-02–47 Tahun 2000; Rayuan Sivil No W-02–48 Tahun 2000) dan *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 yang memutuskan bahawa EGM Majlis Peguam Malaysia yang dicadangkan adalah bertentangan dengan perkara-perkara 125 dan 127 Perlembagaan Persekutuan, dan bahawa hanya Parlimen boleh membincangkan kelakuan hakim. Perkara 127 hanya memperuntukkan bahawa Parlimen tidak boleh membincangkan kelakuan hakim kecuali berhubung usul substantif dan tertakluk kepada keperluan prosedur tertentu dalam memberikan notis; dan bahawa kelakuan hakim tidak boleh dibincangkan oleh mana-mana Perhimpunan Perundangan Negeri. Perkara 127 meletakkan sekatan ke atas Parlimen dan larangan ke atas badan perundangan negeri berhubung kuasa untuk membincangkan kelakuan para hakim. Ia adalah badan-badan perundangan negeri dan persekutuan yang mana perkara ini adalah berkaitan. Sekatan atau larangan tersebut tidak dikenakan ke atas masyarakat umum. Berhubung perkara 125, perkara ini tiada kaitan dengan hak atau kuasa untuk membincangkan kelakuan para hakim sama ada oleh badan-badan perundangan atau oleh masyarakat umum (lihat perenggan 57–58 & 65–66).

(4) Perkara-perkara 125 dan 127 bertujuan untuk melindungi dan mengekalkan prinsip perlembagaan asasi kebebasan kehakiman dan doktrin pengasingan kuasa yang mana dipegang oleh Perlembagaan Malaysia (lihat perenggan 67).]

Notes

For cases on action against Malaysian Bar generally, see 9 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2190–2191.

For cases on conduct of judges in the judiciary generally, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1728–1730.

For cases on declaratory relief, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4702–4703.

Cases referred to

Gouriet v Union of Post Office Workers [1978] AC 435 (refd)

Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 (refd)

Gupta v President of India AIR [1982] SC 149 (refd)

Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833 (refd)

Kesatuan Pekerja-Pekerja Perusahaan Logam & Anor v The Honourable Minister of Labour, Malaysia [1991] 3 CLJ 2164 (refd)

Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals [1997] 3 MLJ 23 (refd)

Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun [2000] 4 MLJ 77 (refd)

Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan [2005] 1 MLJ 15 (not folld)

Majlis Peguam Malaysia dan 2 yang lain lwn Raja Segaran a/l S Krishnan (Rayuan Sivil No W-02–47 Tahun 2000; Rayuan Sivil No W-02–48 Tahun 2000) (not folld)

Ravichandaran Iyer v Justice AM Bhattacherjee & Ors [1995] 5 SCC 457 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Wong Pot Heng & Anor v Kerajaan Malaysia [1992] 2 MLJ 885 (refd)

Legislation referred to

Constitution of India [India] arts 121, 124
Federal Constitution arts 125, 125(2), 125(3), 127
Legal Profession Act 1976 ss 42(1)(a), 42(1)(d), 42(1)(e), 42(1)(g), 65(1)
Rules of the High Court 1980 O 18 r 19
Sedition Act 1948

DP Vijandran (Rajoo Kuppan with him) (DP Vijandran & Associates) for the plaintiff.

Raja Aziz Addruse (Ambiga Sreenevasan, Ranjit Singh, Christopher Leong, James Khong and Darren Teo Sze Hoong with him) (Chooi & Co) for the defendant.

Mohd Hishamudin J:

INTRODUCTION

[1] The plaintiff, Encik Raja Segaran, is a member of the Malaysian Bar.

[2] The defendant, the Malaysian Bar, is a body corporate established pursuant to the Legal Profession Act 1976 ('the Legal Profession Act'). The membership of the Malaysian Bar consists of all advocates and solicitors of the High Court of Malaya who have valid practicing certificates issued pursuant to the Act.

[3] The plaintiff's action in the present case is directed at preventing an extraordinary general meeting of the Malaysian Bar ('the EGM') from being convened on 23 June 2000 to discuss, consider and, if thought fit, to pass certain proposed resolutions, inter alia, calling upon the Prime Minister to make a representation to His Majesty the Yang di Pertuan Agong pursuant to art 125(3) of the Federal Constitution for the appointment of a tribunal to investigate into the conduct of the then Chief Justice YAA Tun Eusoff Chin ('the Chief Justice'); or, alternatively, for the government to cause to be appointed a Royal Commission of Inquiry to investigate into the conduct of the Chief Justice, and the implications of his conduct on the Judiciary; and to make such recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored. The present action further seeks to restrain the Malaysian Bar from holding or causing to be held any similar meetings in the future.

[4] The plaintiff commenced this action against the Malaysian Bar on 19 June 2000. The plaintiff seeks various reliefs and they are set out as follows in para 32 of the statement of claim:

(a) For a declaration that the purported notice is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act.

(b) For a declaration that the convening of the said general meeting is wrongful, illegal, invalid, null and void and/or contrary to the Legal Profession Act.

(c) For a declaration that the said meeting and the said proposed resolution and the publication of the purported notice in the press are ultra vires the Legal Profession Act.

(d) For a declaration that the public statement and the proposed resolution and the proposed general meeting and the publication of the purported notice in the press constitute contempt of court.

(e) For a declaration that the said public statement and the said proposed resolutions and the said general meeting and the publication of the purported notice in the press constitute offences under the Sedition Act 1948.

(f) For an injunction to restrain the Malaysian Bar either by themselves and/or their servants and/or agents from holding the said general meeting on 23 June 2000.

(g) A an injunction to restrain the Malaysian Bar either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further similar meetings with the same or similar purposes that constitute contempt and/or an abuse of power.

(h) Damages.

(i) Costs.

THE TRIAL

[5] This case is peculiar. The plaintiff, having commenced the action, he now gives the impression as if he is no longer interested in prosecuting his claim. He did not testify at the trial; nor did he call any witness to give evidence. In fact, the plaintiff was absent throughout the entire trial. Only his two counsel were present, that is, Encik DP Vijandran and Encik Raja Kuppan.

[6] The trial commenced on 14 August 2006. On that day, Encik Vijandran, learned counsel for the plaintiff, before the trial began, did not explain to the court as to why the plaintiff was absent. However, at a later date, on 16 August 2006, before the continuation of the trial began, Encik Vijandran informed the court from the bar that the plaintiff was not able to attend court as he was overseas in Glasgow, Scotland, working there as a lecturer and was unable to obtain leave to attend the trial.

[7] On my part, I take it that it is up to the plaintiff whether he wishes to attend the trial or not. There is no compulsion for him to attend court; or to call witnesses; or to adduce evidence; provided he is prepared to accept the consequences (if any) of his absence or actions or omissions, including whatever inferences (if any) that the court might make by reason of such absence, actions or omissions. But as to the reason as to why he was absent at the trial, as no evidence was adduced by the plaintiff to substantiate what

was asserted by learned counsel from the bar as being the reason for his absence, I am unable to accept the reason given to court by Encik Vijandran. It is, however, true that the original trial dates were 25–29 June 2007 and that during the case management proceeding of 21 July 2005, in the presence of all parties, I brought forward the dates to 14–16 August 2006 because I thought the original trial dates were too far away. But when these August 2006 dates were fixed, it was fixed with the agreement of all parties. There was no intimation to the court that the new dates were not suitable to the plaintiff.

[8] In contrast to the manner the plaintiff conducts his case, the Malaysian Bar, as the defendant, on the other hand, called many witnesses to give evidence as witnesses for the defence. The number of journalists that were called as witnesses was unprecedented. From my experience on the bench, never before were so many journalists called to testify in one single trial. There is also a Cabinet Minister on their list who came to testify on behalf of the Bar. He was the Minister in the Prime Minister's Department in charge of legal affairs at the material time (after this I shall be referring to him as 'the Law Minister'). All in all there are 22 witnesses called by the Malaysian Bar to testify, and they are as follows:

(a) Encik Sheridan Mehavera bin Mohamad Shakir (DW1), a journalist with *The New Straits Times*.

(b) Encik Adie Suri bin Zulkefli (DW2), a journalist with *The New Straits Times*.

(c) Puan Kamariah bt Che Ahmad (DW3), a journalist with *Utusan Malaysia*.

(d) Encik Kadir bin Dikoh (DW4), a journalist with *Berita Harian*.

(e) Puan Claudia Theophilus (DW5), a journalist with *Malaysiakini*.

(f) Encik Ramlan bin Said (DW6), an Assistant News Editor with *The New Straits Times*.

(g) Cik Ng Li Yiao (DW7), a journalist with *The Star*.

(h) Cik Carolyn Hong Sook Yee (DW8), a journalist with *The Straits Times*, Singapore.

(i) Puan Hamidah bt Atan (DW9), a journalist with *The New Straits Times*.

(j) Puan Esther Ng Sek Yee (DW10), a journalist with *The Star*.

(k) Encik Wan Hamidi bin Hamid (DW11), a journalist with *The New Straits Times*.

(l) Puan Anis Fatimah bt Ibrahim (DW12), a journalist with *The New Straits Times*.

(m) Cik Jacqueline Ann Surin (DW13), an Assistant News Editor with *The Sun*.

(n) Cik Koh Lay Chin (DW14), a journalist with *The New Straits Times*.

(o) Cik Santha Melani Oorjitham (DW15), a journalist with *The New Straits Times*.

(p) Puan Noraini bt Abd Razak (DW16), a reporter with *Utusan Malaysia*.

(q) Encik Noor Azam bin Shairi (DW17), a journalist with *Mingguan Malaysia*.

(r) Encik Zulkifli bin Jalil (DW18), a journalist with *Utusan Malaysia*.

(s) Encik Nazeri bin Nong Samah (DW19), a journalist with *Utusan Malaysia*.

(t) Dato' Kuthubul Zaman bin SNS Bukhari (DW20), the Secretary of the Malaysian Bar at the material time.

(u) Tuan Haji Sulaiman Abdullah (DW21), the President of the Malaysia Bar and Chairman of the Bar Council at the material time.

(v) YB Datuk Seri Utama Dr Rais Yatim (DW22), the Law Minister at the material time.

BACKGROUND FACTS

[9] As a convenient starting point, I shall refer to a news report in the 31 May 2000 issue of *The New Straits Times*. The report is entitled 'Rais: Judiciary needs Rejuvenation'. The report says as follows:

(a) that Datuk (Dr) Rais Yatim (the Law Minister) was in Australia attending a Malaysian-Australian conference;

(b) that, while he was there, he was interviewed by a reporter called Diane Martin, and which interview was aired over Australia's Radio National's 'Asia Pacific' programme on 30 May 2000;

(c) that, in the course of the interview, the Law Minister, said that the Malaysian Judiciary needed rejuvenation, that the Malaysian judicial system needed a re-examination and that the country needed a new value system;

(d) that, in response to the question as to what was Malaysia's perspective as to its faults and shortcomings, the Law Minister had said that he agreed with the criticism that the judiciary needed some new things, that this had to be brought about by the people and the lawyers, and

that he urged the lawyers in Malaysia to be more forthright and to form committees to inform the government as to what was best suited for the future of the country;

(e) that the Law Minister was also asked about a picture on the Internet showing the Chief Justice of the Federal Court, Tun Eusoff Chin, holidaying in New Zealand with a lawyer, Datuk VK Lingam;

(f) that in response to the said question, the Law Minister, had said:

> I'm not in the position to say whether I approve or not, but certainly, such socialising is not consistent with the proper handling or behavior of a judicial personality. And therefore this is not something which I do not know, this is something that we are in the know, and we have intimated to the Chief Justice that this is improper behavior. And this has been intimated to him in no uncertain terms.

[10] The latter bold statement by the Law Minister was clearly a 'bombshell'. The comment was a direct criticism of the Chief Justice and, undoubtedly, called into question his integrity. Not surprisingly, there were soon verbal reverberations in Kuala Lumpur. The comments by the Law Minister generated much public interest in Malaysia. There were discussions, comments and debates in the mass media.

[11] In the beginning, what ensued from the Law Minister's comments were exchanges of remarks between the Law Minister and the Chief Justice; and these exchanges were reported in all the major daily newspapers in Malaysia.

[12] The initial reaction by the Chief Justice to the Law Minister's comments in the interview, as reported in the press on 7 June 2000, was publicly vocal and threatening. In effect, the Chief Justice rebuked the Law Minister and warned that he would take legal action. This is what the newspaper report in *The Sun* entitled 'Eusoff: I paid for my own holidays overseas' published on 7 June 2000 states:

> Chief Justice of the Federal Court Tun Eusoff Chin warned that he will sue anyone alleging his holidays overseas were paid for by a third party. Showing a stack of bills ranging from expenses for airfare tickets to hotel accommodation, Eusoff said he paid for every single sen that was spent during his trip to New Zealand in 1994. He said the accusation arose after a photo of him holidaying with a lawyer Datuk VK ingam was posted on the Internet. 'The insinuation from that is somebody paid for the trip. That is a very serious allegation. If anyone says that I'll sue him'. He said today after witnessing an oath taking ceremony by five judicial commissioners who were elevated to High Court judges. Eusoff was asked about

A the comments made by Minister in the Prime Minister's Department Datuk Dr Rais Yatim on the photo when interviewed by Australia's Radio National on May 30.

B **[13]** In another newspaper report in *The Sun* entitled 'Eusoff Takes Rais to Task' by Arfa'eza A Aziz published on 7 June 2000, it is reported:

> Chief Justice of the Federal Court Tun Eusoff Chin today took Minister in the PM's Department Datuk Dr Rais Yatim to task for commenting on the judicial system, saying they have never discussed the matter. Rais has never met him to
> C discuss anything but instead chose to talk to the press, Eusoff said … Asked about Rais' comments to the Australian media last month that the judiciary needs rejuvenation, Eusoff said he does not understand what the Minister means. 'I read the report. He (Rais) said we need rejuvenation but in the next paragraph he said: 'what they (rejuvenation) are have to be left for further study and verification'. So he also doesn't know what they are. Why should be he talking about what he does
> D not know?' said Eusoff … Contacted for his response Rais said his call for rejuvenation in the judiciary was based on public feedback and views from practitioners and the government. 'I made the interjection upon realising the state of affairs in the judiciary as a whole, not to mention the views of others' … Eusoff also said that Rais is only in charge of the Chief Registrar's office and not of the
> E law and judiciary. 'He's more responsible for logistic problems. If we lack court equipment or rooms, then we go to him,' he said.

F **[14]** In *The Star*, the news report on 7 June 2000 under the heading 'Lawyer didn't pay for holiday says CJ', by Chelsea LY Ng, reads as follows:

> Chief Justice Tun Eusoff Chin warned yesterday that he would sue anyone who alleged that his New Zealand holiday in 1994 was paid for by lawyer Datuk VK Lingam. Eusoff, who turn 65 on June 20, said that he paid his own bills. He showed reporters some credit card bills and bank statements relating to the trip to
> G Christchurch, Auckland and Queenstown. He was responding to statements made by Minister in the Prime Minister's Department Datuk Dr Rais Yatim in an interview aired over ABC Radio's 'Asia Pacific' programme on Monday night of May 29. In that interview, Dr Rais, when asked about the photographs of Eusoff and Lingam on holiday in New Zealand, had said: 'We have intimated to the Chief
> H Justice that this is improper behavior. And this has been intimated to him in no uncertain terms'. 'Who is 'we'? was Eusoff's response. 'Is it the Cabinet or is he talking about himself? As far as I am concerned no one had any dialogue with me. Never talked to me at all. Not only about this. Not about any other matter as well. He only speaks to the papers. He could have spoken to me, you know. Judges are not robots. Judges are human beings. They have to have friends. When they die,
> I their friends will have to bury them. Only people without relatives and friends will be buried by, maybe, the hospital authorities', he said. Eusoff explained that he had bumped into Lingam in New Zealand and that the photograph was taken at Lingam's request … 'I was going to the zoo and he asked 'Could I tag along?' Eusoff said, adding that they were both carrying their cameras with them.

[15] Encik Christopher Leong, learned counsel for the Malaysian Bar submits that such a response from a member of the judiciary, by no less than the Chief Justice, was not normal. The members of the judiciary, by virtue of the office they hold, do not usually respond publicly to criticisms, and certainly do not issue public threats.

[16] The controversy, however, did not end there: it continued to be played out in public the next day. On 8 June 2000, all the major newspapers carried further reports of the heated exchange between the Chief Justice and the Law Minister. In particular, the Law Minister was reported to have described the Chief Justice's response as 'defensive outburst of unwarranted remarks'. In this regard I refer to the news report published on 8 June 2000 in *Utusan Malaysia* entitled 'Eusoff tak perlu melenting' by Noraini Abdul Razak, which reads:

> Datuk Dr Rais Yatim berkata, Ketua Hakim Negara Tun Mohd Eusoff Chin melenting mungkin kerana dia 'rasa pedas cili' ekoran dakwaan beliau bercuti ke New Zealand pada Disember 1994 atas tajaan seseorang. Menteri di Jabatan Perdana Menteri itu berkata, Eusoff tidak perlu menunjukkan rasa bersalah atau melenting terhadapnya sekiranya perkara tersebut tidak berlaku kerana kelak akan menimbulkan tanda tanya di kalangan rakyat. 'Saya tidak pernah meminta ditunjukkan bil atau tiket bagi membuktikan percutian itu tidak ditaja oleh sesiapa, kenapa perkara ini perlu dijawab. Sekiranya rasa pedas cili tu, orang itu saja yang tahu, saya tak tahu sebaliknya saya cuma mengharapkan sebuah badan kehakiman yang mengamalkan konsep integriti dan saya sentiasa menghormati mereka', katanya kepada pemberita di pejabatnya di sini hari ini … Ditanyakan apakah faktor yang mendorong Eusoff memberi reaksi sedemikian, Dr Rais yakin Ketua Hakim Negara itu tidak suka mana-mana pihak mengeluarkan pandangan seumpama itu.

[17] And on the same day (ie 8 June 2000) there is also the news report published in *The Sun* entitled 'Judges Also Accountable' by Claudia Theophilus that reads:

> The judiciary is not above criticism and should take cognizance of public opinion to improve itself, Minister in the PM's Department Datuk Dr Rais Yatim said … If the practices of the judiciary raise concern among people, he said they should be able to criticise so that changes occur. 'There is no need for defensive outburst of unwarranted remarks because there is a responsibility and integrity on the judiciary to take such criticism constructively.' … Rais said he was only asked whether it was proper for someone of the Chief Justice's stature to be photographed with a senior lawyer who appears before his court. 'I replied that it was inappropriate for someone of that standing to be found in such a disposition. I could not deny the pictures as otherwise it would have reflected badly on me and the Government, as being irresponsible.'

[18] Then, also on the same day, there was the news report in *The New Straits Times* entitled 'Judiciary should take criticism in its stride' by Carolyn Hong. This report reads:

> Defending himself against Chief Justice Tun Mohd Eusoff Chin's rebuke over his comments on the judiciary, Rais said it was his duty to see that the judiciary was well equipped and that there was integrity and productivity. 'If the Minister (in charge of law) can't say anything about the judiciary, who else can'? … He said although the judiciary was independent, the Government could voice concern in areas like integrity and productivity as public funds were involved. He was responding to Eusoff's criticism yesterday that he (Rais) had overstepped his boundaries by talking about justice, when his duties were restricted to Court administration.

[19] The following day, that is, on 9 June 2000, the controversy persisted. If previously the exchanges were only between the Law Minister and the Chief Justice, this time a third personality had come in to join in the fray. This third person was the President of the Court of Appeal, Tan Sri Lamin bin Mohd Yunus, whose comment appears to be defensive of the Chief Justice. He too joined in the Chief Justice in criticising the Law Minister. The news report of that day as published in the *Utusan Malaysia* entitled 'Eusoff, Lamin bidas Rais' by Kamariah Ahmad and Rosni Hassan has this to say:

> Ketua Hakim Negara dan Presiden Mahkamah Rayuan hari ini membidas balik Datuk Dr Rais Yatim kerana dikatakan tidak tahu prosedur apabila 'memukul' badan kehakiman itu di luar negara. Tun Mohd Eusoff Chin dan Tan Sri Lamin Mohd Yunus hari ini mempersoalkan tindakan Menteri di Jabatan Perdana Menteri itu yang dikatakan cuba mendedahkan kelemahan badan kehakiman Negara kepada media asing. Lamin, orang nombor dua dalam institusi kehakiman semasa mempertahankan Eusoff berkata, institusi kehakiman adalah badan yang sensitif dan menjadi tulang belakang Kerajaan serta mencerminkan imej negara. 'Kalau ada masalah dalaman biar kita selesaikan secara dalaman, kita terima bila-bila masapun … bukan kita kata kita benar sentiasa tapi janganlah 'pukul' kita di luar. Kita sentiasa mahu menjalankan tugas sebaik mungkin' katanya kepada pemberita selepas majlis penyampaian Anugerah Kualiti Ketua Hakim Negara dan Anugerah Perkhidmatan Cemerlang 1999 di sini. Eusoff yang menemui pemberita di pejabatnya petang ini pula berkata, beliau tidak pernah melenting tetapi terpaksa menerangkan fakta sebenar apabila isu beliau bergambar dengan peguam Datuk VK. Lingam diulas oleh Rais kepada media asing. 'Saya tidak melenting seperti yang dikatakan oleh Rais … 'rasa pedas cili' saya komen setakat itu sahaja,' jelasnya … Sementara itu Lamin berkata, seseorang Menteri sepatutnya lebih berhati-hati apabila membuat sebarang kenyataan ketika di luar negara kerana ia boleh memberi implikasi terhadap Malaysia. 'Ia akan menyebabkan orang akan berkata perkara yang tidak wujud sebagai wujud kerana seorang Menteri yang bercakap mengenainya. Tak perlu saya hendak menunjuk ajar seorang Menteri bagaimana hendak ditemubual di luar negara,' katanya... Mengenai kenyataan Rais bahawa Eusoff melenting mungkin kerana dia 'rasa pedas cili' ekoran dakwaan beliau bercuti kerana tajaan seseorang, kata Lamin: 'Pada saya tak perlulah seorang

> Menteri menasihatkan bahawa beliau tak perlu melenting, terpulang kepada perasaan individu kerana beliau (Eusoff) pun lebih tua daripada Menteri. Beliau tahu bila hendak melenting'.

[20] A perusal of the news media at the material time shows that the issue of the Chief Justice's holiday in New Zealand, the issue of the 'rejuvenation' of the judiciary and the public exchanges between the Chief Justice and the Law Minister, were generating heated public debates and discussions. It is, however, to be observed that most of such debates and discussions were coming down on the side of the Law Minister and critical of the Chief Justice.

[21] Among those that joined in the public discussions in the media were:

(a) Tun Daim Dzainuddin (the then Finance Minister);

(b) Datuk Hishammuddin Tun Hussien, the UMNO Youth Chief;

(c) Puan Zaiton Othman, the President of Persatuan Peguam-Peguam Muslim Malaysia;

(d) other politicians; and

(e) editorial and/or opinion articles published in the news print media and letters to the editor.

[22] Tun Daim's comment was published on 9 June 2000 in *The Sun* in the newspaper report entitled 'Judges are not above criticism, says Daim'. The newspaper report is as follows:

> Finance Minister Tun Daim Zainuddin said today the people can make their views known if they think that judges have erred. He said although the judiciary is independent, judges should not think that they cannot be criticised. 'The judiciary is independent when discharging its duties … but if a judge hits someone, he can also be punished. And if any judge errs in his conduct, the people may want to give their views,' he said after meeting Merbok MCA members. He was commenting on Chief Justice of the Federal Court Tun Eusoff Chin's reaction to a statement by Minister in the PM's Department, Datuk Rais Yatim, relating to Eusoff's holiday in New Zealand.

(There is also a newspaper report published on 9 June 2000 in *Utusan Malaysia* entitled 'Rakyat berhak tegur badan kehakiman — Daim'.)

[23] Among the other politicians that came out in support of the Law Minister was Dato' Hishammuddin Tun Hussein, the Head of UMNO Youth. In this regard, there is this news report of 8 June 2000 by Nazeri Nong Samah in the *Utusan Malaysia* bearing the title 'Pemuda UMNO sokong teguran Rais'. It reads as follows:

A Hishammuddin mengulas laporan mengenai kenyataan Dr Rais menerusi wawancara oleh Australia's Radio National pada 28 Mei lalu yang menjawab soalan stesen radio itu berkaitan isu Ketua Hakim Negara, Tun Mohd. Eusoff Chin … Hishammuddin percaya bahawa sebagai Menteri di Jabatan Perdana Menteri, Dr Rais hanya melahirkan pandangan supaya para hakim membantu memperbaiki
B prestasi kehakiman agar ia lebih berkesan dan bergerak mengikut perubahan zaman. Justeru tegasnya, teguran yang disuarakan itu haruslah diberi perhatian yang sewajarnya demi kebaikan sistem kehakiman Negara. 'Pemuda UMNO berpendapat kelakuan dan tindak-tanduk mahupun pergaulan ahli-ahli kehakiman termasuk hakim dan peguam hendaklah sentiasa berektika agar sebarang rasa syak wasangka tidak timbul,' katanya.
C

[24] The comments of other high ranking political personalities were in the news report published on 9 June 2000 in *Utusan Malaysia* entitled 'Badan Kehakiman perlu telus menerima kritikan'. This report by Nazeri Nong
D Samah reads:

(a) Ahli Majlis Tertinggi UMNO, Datuk Ahmad Zahid Hamidi berkata, walaupun Kerajaan misalnya tidak boleh campur tangan dalam bidang penghakiman, tetapi ia boleh menegur dalam aspek
E pentadbiran dan pergaulan supaya bidang kehakiman benar-benar bebas daripada sebarang pengaruh. 'Seperti juga dengan suruhanjaya yang ditubuhkan oleh kuasa-kuasa di bawah Yang Di Pertuan Agong, badan kehakiman merupakan 'manusia biasa' yang walaupun tertakluk kepada kekebalan, tetapi mereka tidak seharusnya
F menggunakan status itu untuk menepis sebarang pandangan yang membina', katanya ketika dihubungi hari ini. Ahmad Zahid mengulas kenyataan Menteri di Jabatan Perdana Menteri, Datuk Dr Rais Yatim berikutan ulasan Menteri itu mengenai gambar hakim berkenaan bersama seorang peguam di dalam Internet. Ahmad Zahid
G bagaimanapun mengingatkan bahawa menerusi pengalamannya yang baru pulang dari luar negara, isu pertelagahan di antara badan kehakiman dengan Menteri itu telah diberi gambaran yang buruk oleh akhbar di Singapura'.

H (b) Seorang lagi ahli Majlis Tertinggi UMNO, Datuk Abdul Azim Mohd Zabidi berkata, Rais memang berhak menegur badan kehakiman supaya sentiasa dihormati oleh rakyat sebagai institusi perundangan tertinggi. Menurutnya, teguran yang dibuat oleh Rais itu, wajar
I kerana ia bukan menyentuh kepada soal penghakiman, tetapi kepada pentadbiran termasuk perilaku dan imej hakim supaya tidak dipertikai oleh masyarakat.

(c) Ahli Exco Pergerakan Pemuda UMNO, Zein Isma Ismail pula berkata Rais berada pada landasan yang betul kerana tegurannya adalah secara umum demi menjaga imej badan kehakiman itu.

'Hakim juga perlu sentiasa menjaga perilaku supaya tidak menimbulkan implikasi terhadap imej mereka sebagai individu yang dihormati di dalam institusi kehakiman sesebuah negara', katanya.

(d) Ketua UMNO Bahagian Cheras, Syed Ali Alhabshee pula berkata, Rais adalah orang yang paling layak untuk bercakap dan menegur sistem kehakiman negara jika ia tidak berada di landasan yang betul.

[25] The comment of Puan Zaiton Othman, the President of the Persatuan Peguam-Peguam Muslim Malaysia ('PGMM'), was reported in the *Utusan Malaysia* issue of 9 June 2000 under the heading 'Peguam Muslim minta Rais, Eusoff selesai kekeliruan'. This is what the news report says:

Persatuan Peguam-Peguam Muslim Malaysia ('PGMM') hari ini meminta Ketua Hakim Negara, Tun Mohd Eusoff Chin dan Menteri di Jabatan Perdana Menteri, Datuk Dr Rais Yatim mengadakan pertemuan empat mata bagi menyelesaikan sebarang kekeliruan yang timbul. Presiden PGMM, Zaiton Othman berkata, kedua-dua pihak terlibat perlu berbincang bagi mencari penyelesaian ke atas sebarang permasalahan yang timbul demi kebaikan institusi kehakiman dan kerajaan. Katanya, langkah itu perlu bagi mengelakkan unsur campur tangan pihak luar yang boleh memburukkan lagi keadaan. 'Kedua-dua pihak perlu berbincang bagi menerangkan apa sebenarnya yang berlaku untuk mengelakkan isu berkenaan dipanjangkan dan disalah ertikan,' katanya kepada Utusan hari ini. Beliau berkata demikian ketika diminta mengulas 'pergeseran' antara Eusoff dan Rais ekoran kenyataan menteri itu semasa diwawancara oleh Australia's Radio National pada 28 Mei lalu bercakap mengenai gambar dalam Internet yang menunjukkan Ketua Hakim Negara itu bersama Datuk VK Lingam bercuti di New Zealand.

[26] In the editorial dated 9 June 2000 of *The New Straits Times* entitled 'Don't Be Averse To Criticism' the following excerpt appears:

It is the public perception of a judge's conduct that matters rather than any defence that the judge might put forth to deny any allegation leveled against him. It has been succinctly said by Rais, and we are in full-hearted agreement with him, that the judiciary is not above criticism and should take cognisance of public opinion to improve itself.

As a public officer which is continuously under public gaze, there should be no act or omission by any member of the judiciary that is unbecoming of the high office and the public esteem in which that office is held. This point has been acknowledged by no less than Chief Justice of the Federal Court Tun Mohd Eusoff Chin himself who said today that 'all court staff are responsible to uphold the court's image'.

It is clear Rais' comment on the controversy over the photograph of the Chief Justice and a member of the Bar on holiday in New Zealand was not made in bad faith. As Minister in charge of legal affairs, the public expects him to speak out on a matter which has generated a host of insinuations that threaten to taint the image of the Malaysian judiciary.

[27] Now, in view of the ongoing public controversy, as early as 7 June 2000, the Executive Committee of the Bar Council met and decided to recommend that an extraordinary general meeting of the Malaysian Bar be convened as soon as possible to deliberate and pass resolutions on matters relating to the allegations made by the Law Minister. A letter dated 7 June 2000 to this effect, and signed by Haji Kuthubul Zaman Bukhari as the Secretary of the Malaysian Bar, was sent out to members of the Bar Council. The letter also stated that the Executive Committee will meet again on 8 June 2000 at 5.30pm to consider the resolutions to be tabled at the forthcoming EGM, and requested that members of the Bar Council respond by telephone or fax to Ms Catherine Eu, the Executive Director of the Bar Council, or to the Secretary of the Malaysian Bar by 8 June 2000 at 4pm as to whether or not they support the recommendation by the Executive Committee. On 8 June 2000, an amended letter was sent to members of the Bar Council which contained a correction of the letter dated 7 June 2000, namely, the words 'Extraordinary General Meeting of the Bar Council' were changed to 'Extraordinary General Meeting of the Malaysian Bar'.

[28] By 4pm on 8 June 2000, the majority of the members of the Bar Council had signified their agreement and support to the recommendation by the Executive Committee.

[29] Following thereon, a public statement dated 10 June 2000 was issued by the Chairman of the Bar Council, Tuan Haji Sulaiman Abdullah (DW21). The public statement is in the following terms:

BAR COUNCIL PUBLIC STATEMENT

ON

THE PROPOSED GENERAL MEETING OF THE BAR

The Bar Council has given careful consideration as to how the controversy relating to the Honourable Chief Justice's holiday in New Zealand should be best resolved.

The Bar Council notes that the Minister in the Prime Minister's Department, Datuk Dr Rais Yatim, stated in Australia in response to a question about a photograph showing the Chief Justice together with a lawyer Datuk VK Lingam, while holidaying in New Zealand that it had been intimated to the Chief Justice that this was improper behaviour and that such socialising was not consistent with the proper behaviour of a judicial personality;

In subsequent statements, the Minister had called for more efficiency, transparency, integrity and accountability in the judicial system;

The Malaysian Bar wholeheartedly believes that such qualities are absolutely vital in the proper functioning of the judiciary. It is in the national interest that public confidence that the Judiciary embodies these values should never be eroded.

While senior members of the Judiciary have attempted to rebut such criticism the Bar Council is aware that convention prevents the Judiciary from going to the Press about these matters.

The inescapable fact is that serious issues affecting the integrity of the Judiciary have been raised publicly and thus cannot be ignored or disregarded.

The Bar, as the natural friends, protectors and guardians of the sanctity of the Judiciary is left with no option but to examine the whole matter and propose solutions at a general meeting.

Hence the proposed resolutions for consideration at the General Meeting call for the appointment of either a Tribunal under art 125(3) of the Constitution or a Royal Commission of Inquiry to investigate the allegations raised against the Chief Justice. This will give the Chief Justice the best possible opportunity to refute the serious allegations made against him and for such Tribunal or Royal Commission to make such recommendations as may be appropriate to restore full public confidence in the Judiciary.

The Bar Council will be convening the General Meeting at 2.30pm on Friday, 23 June 2000 at the Ballroom of the Kuala Lumpur Hilton to consider and, if approved, to adopt the motion proposed by the Bar Council as follows:

WHEREAS

1. Datuk Dr Rais Yatim, the Minister in the Prime Minister's Department, had, in an interview he gave in Australia on 30 May and in response to a question asked about a photograph published on the Internet showing the Chief Justice of the Federal Court, Tun Eusoff Chin, holidaying in New Zealand with a lawyer, Datuk VK Lingam, said:

> I am not in the position to say whether I approve or not, but certainly, such socialising is not consistent with the proper handling or behavior of a judicial personality.
>
> And therefore this is not something which I do not know, this is something that we are in the know, and we have intimated to him in no uncertain terms.

2. The Minister had on 7 June called for more efficiency, transparency, integrity and accountability in the judicial system.

3. These statements have been widely published in this country.

4. Bearing in mind the principle that the conduct or behavior of a judge should be such as not to give rise to a suspicion that he is not impartial, the conduct of the Chief Justice described in the statements by the Minister may affect the integrity of the Judiciary and may erode public confidence in the administration of justice.

5. The Malaysian Bar, being committed to the principle that the judiciary is a vital and fundamental organ of a democratic state, endorses the view of the said Minister that every Malaysian has the right to make such comments as will improve the judicial system.

6. It is imperative for the maintenance of public trust and the independence of the Judiciary that the Chief Justice and every other member of the Judiciary should be beyond suspicion of any improper conduct.

IT IS HEREBY RESOLVED THAT THE MALAYSIAN BAR

1. supports the call by the Minister for the 'rejuvenation' of the Judiciary;

2. calls upon the Prime Minister to make written representations to the Yang Di Pertuan Agong pursuant to art 125(3) of the Federal Constitution for the appointment of a Tribunal to investigate into the conduct of Tun Eusoff Chin;

3. alternatively, calls upon the Government to cause to be appointed a Royal Commission of Inquiry to investigate into the conduct of Tun Eusoff Chin and its implications on the Judiciary, and to make such recommendations as may be appropriate to ensure that confidence in the Malaysian Judiciary is fully restored;

4. calls for the suspension of Tun Eusoff Chin pending the decision of such Tribunal or Royal Commission of inquiry.

Dated this 10 June 2000

[signature]

HAJI SULAIMAN ABDULLAH

PRESIDEN

BADAN PEGUAM MALAYSIA

[30] Thereafter, the Secretary of the Bar Council issued a formal notice dated 13 June 2000 to all members of the Malaysian Bar to convene an extraordinary general meeting of the Malaysian Bar to consider the Bar Council's proposed resolutions that I have just mentioned.

[31] However, on 12 June 2000, the plaintiff wrote a letter to the Bar Council demanding that the proposed EGM not be proceeded with, and in the event written confirmation from the Bar Council acceding to his demand was not received by the plaintiff within 48 hours, the plaintiff would make an application to court.

[32] On 13 June 2000, the Bar Council replied to the plaintiff to state that it would proceed with convening the proposed EGM. On 15 June 2000 the Bar Council issued by way of an advertisement in the press a notice of the proposed EGM.

[33] The plaintiff then immediately by summons in chambers applied to the High Court for an interim injunction to restrain the Malaysian Bar from holding the EGM. RK Nathan J granted the interim injunction. The Malaysia Bar appealed to the Court of Appeal. The appeal was dismissed by the Court of Appeal.

THE PLAINTIFF'S CONTENTIONS

[34] The plaintiff's contentions are as follows:

(1) that the Bar Council's notice calling for the EGM is contrary to the Legal Profession Act, and is null and void;

(2) that the proposed EGM has been convened contrary to the Legal Profession Act;

(3) that the formulation of the proposed resolutions, the decision to call for the proposed EGM, the issuance of the notice, the holding of the proposed EGM, the participation thereof by members of the Malaysian Bar, the discussion of the proposed resolutions and its adoption at the proposed EGM and any action to seek its implementation, will all constitute acts of contempt of court;

(4) that the convening of the proposed EGM is ultra vires the provisions and scope of the Legal Profession Act;

(5) that the holding of the proposed EGM and the adoption of the proposed resolutions would constitute an offence under the Sedition Act 1948; and

(6) that the proposed resolutions are contrary to arts 125 and 127 of the Federal Constitution.

THE MALAYSIAN BAR'S CONTENTIONS

[35] The Malaysian Bar's position is explained by the evidence of the then President of the Malaysian Bar. Tuan Hj Sulaiman in his evidence in his witness statement states:

> Q8: *As the President of the Malaysian Bar at that time, what did you make of this newspaper report at that time?*

A8: Firstly, the comments in the newspaper report were extremely serious in nature. Datuk Dr Rais Yatim is a Cabinet Minister in the Prime Minister's Department and carried the portfolio concerning the nation's legal affairs. He was making allegations against the judiciary which according to him required 'rejuvenation'. Serious allegations of improper behavior were also made against the Chief Justice.

Secondly, as can be seen from the newspaper report, his comments appeared measured and unambiguous.

Thirdly, the newspaper report showed that his comments were made in Australia to a foreign correspondent in a radio interview carried by the Australian Radio National's 'Asia Pacific' programme broadcasted or aired on or about 30 May 2000. The New Straits Times then carried the interview nationwide in Malaysia the next day. In effect, his comments were carried internationally by the media.

Q9: *Given the seriousness and wide circulation of his comments, did you do anything?*

A9: As President of the Malaysian Bar, I immediately called for a meeting with the other members of the Executive Committee ('EXCO') of the Bar Council and we discussed the said newspaper report.

We all agree to the proposed 'rejuvenation' of the judiciary. In this, we took 'rejuvenation' to mean addressing the public's negative perception of the judiciary. Such as the lack of independence, transparency and efficiency of the judiciary. Such public perception of the judiciary was prevalent at that time. We welcomed his suggestion for a 'rejuvenation'.

However, we were also of the view that the Malaysian Bar, as a stakeholder in the administration of justice in this country, must ensure a proper investigation by proper parties of the comments that have been made public by the said Minister. The Malaysian Bar has consistently demonstrated that it will not shy away from making a stand to defend the institution of the judiciary and the due administration of justice without fear or favour of any personalities involved. In this instance, the integrity of the Chief Justice was specifically called into question. In the event that the public loses all confidence in the judiciary, our entire justice system would be unworkable.

Given the gravity of the situation, the EXCO unanimously recommended the convening of an Extraordinary General Meeting ('the EGM') of the Bar as soon as possible to deliberate and pass resolutions on matters relating to the allegations made by Datuk Dr Rais Yatim against the Chief Justice. In the meantime, we monitored and kept a close eye on the public perception of the matter concerning the said Minister's comments.

...

Q13: *What did you make of these newspaper reports?*

A13: It was very obvious by then that the issues which emanated from Datuk Dr Rais Yatim's comments in Australia were carried extensively by our local newspapers. Tun Eusoff Chin's response was also carried in detail. I was concerned that the arguments between the personalities involved would escalate in the press

and the entire judiciary and our judicial system would be very seriously damaged. In fact, it is very unusual for members of the judiciary to go to the press about such matters.

The EXCO was very worried that public confidence in the judiciary and our judicial system would continue to erode if the matter was not resolved properly soon. Given the magnitude of the controversy in the public domain, the EXCO decided to recommend the convening of an Extraordinary General Meeting of the Malaysian Bar to gather our members as soon as possible to deliberate and pass resolutions on the allegations made by Datuk Dr Rais Yatim against the Chief Justice. In the meantime, we continued to monitor the press coverage of the matter.

THE MALAYSIAN BAR'S SUBMISSION

[36] Encik Christopher Leong for the Malaysian Bar submitted that the testimony of the Law Minister before this court, to the effect that the views of the legal fraternity — which includes the Malaysian Bar and the Bar Council — are required to express itself on such a matter of importance, is a clear invitation or request by a Cabinet Minister to the Bar Council and Malaysian Bar to look into the issue and to express their views in respect of the same. At this juncture I propose to allude to the evidence of the Law Minister.

[37] Firstly, the Law Minister testified that he was aware of a photograph of the Chief Justice having a holiday with a practising lawyer. He testified that a judge seen to be socialising with a practising lawyer is not consistent with the proper handling or behaviour of a judicial personality.

[38] The Law Minister said in his evidence that the views of the legal fraternity, which includes the Malaysian Bar and the Bar Council, are required to express itself on such a matter of importance. As to this evidence of the Law Minister, Encik Christopher Leong submitted that this is a clear invitation or request by a Cabinet Minister to the Bar Council and Malaysian Bar to look into the issue and to express their views in respect of the same.

[39] In cross-examination by Encik Vijandran for the plaintiff, learned counsel brought to the attention of the Law Minister a newspaper report dated 14 June 2000 in *Utusan Malaysia* entitled 'Tidak perlu wujudkan tribunal siasat Eusoff Chin — PM'. According to this report by Zulkifli Jalil and Ismail Daud, the Prime Minister then, Datuk Seri Dr Mahathir, was of the view that there was a political agenda behind the Bar Council's proposal for the appointment of a tribunal to investigate Tun Eusoff Chin and that there was a sinister motive on the part of the Bar Council in making such a proposal. The report reads:

Datuk Seri Dr Mahathir Mohamad berkata, beliau tidak nampak perlunya diwujudkan tribunal untuk menyiasat Ketua Hakim Negara, Tun Mohd Eusoff Chin. Perdana Menteri berkata, beliau berpendapat ada agenda politik di sebalik cadangan itu dan sebagai percubaan untuk melucutkan jawatan seseorang yang menjadi Ketua Hakim Negara. 'Saya fikir ada unsur politik di belakangnya. Ada niat yang tidak baik untuk melaga-lagakan hakim,' katanya pada siding akhbar sekembalinya dari lawatan kerja seminggu di Jepun, di Lapangan Terbang Sultan Abdul Aziz Shah di sini hari ini. Dr Mahathir mengulas cadangan Badan Peguam Malaysia Sabtu lalu, untuk mengadakan mesyuarat bagi mengundi satu cadangan supaya ditubuhkan sebuah tribunal menyiasat dakwaan terhadap Eusoff berhubung kontroversi percutiannya di New Zealand pada 1994.

[40] Encik Vijandran then asked the Law Minister as to whether he was aware of the above statement of the Prime Minister, and the Law Minister answered him in the affirmative. When asked further by Encik Vijandran as to whether he agreed with the stand of the Prime Minister the Law Minister's answer was non-committal.

[41] Encik Christopher Leong also submitted that the Bar Council has the authority to convene such a meeting of the Malaysian Bar by virtue of s 65(1) read with ss 42(1)(a), (d), (e) and (g) of the Legal Profession Act. Section 65(1) of the Legal Profession Act states:

> 65 Extraordinary General Meeting
>
> (1) The Bar Council may convene a general meeting of the Malaysian Bar other than the annual general meeting at any time the Bar Council considers it necessary or expedient; and such meeting shall be known as an extraordinary general meeting.

[42] Section 42(1)(a), (d), (e) and (g) of the Legal Profession Act provide as follows:

> 42 Objects and powers of the Bar
>
> (1) The purpose of the Malaysian Bar shall be —
>
> (a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;
>
> ...
>
> (d) where requested so to do, to express its views on matter affecting legislation and the administration and practice of the law in Malaysia;

(e) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;

...

(g) to protect and assist the public in all matters touching ancillary or incidental to the law

[43] Learned counsel further submitted that there was a cause for the Malaysian Bar to hold an EGM as it has been acknowledged and emphasised by eminent judges that members of the Bar and judges are each an integral part of the proper administration of Justice. Learned counsel referred to a speech by Lord Steyn, a Lord of Appeal of the House of Lords, given on 13 October 1998 and reported in the New Law Journal in the 16 October 1998 issue at p 1525. The learned Law Lord in his speech said:

> It is to the judiciary that the citizen must look for protection from abuses by the Executive and for a vindication of his right against the state. But without an independent Bar, and the jury system, the Judiciary would be unequal in its task. Together the Bar, the Judiciary and the Jury is a guarantee of the quality of our democracy. For my part I regard a highly qualified, independent and courageous Bar as of central importance in our system.

[44] Citing the *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region* (adopted by the Chief Justice of Malaysia, YAA Tun Mohd Eusoff bin Chin on 19 August 1995), the *Bangalore Principles of Judicial Conduct*, *the Commonwealth (Latimer House) Principles on the Three Branches of Government* (as agreed by Law Ministers and endorsed by the Commonwealth Heads of Government Meeting, Abuja, Nigeria, 2003) (also known as the Latimer House Guidelines) and the *Basic Principles on the Role of Lawyers* adopted by the 8th United Nations Congress in 1990, Mr Leong further submitted that it is universally recognised that a competent independent and impartial Judiciary is vital in democracies governed by the rule of law.

[45] Learned counsel for the defendant also referred to the case of *Gupta v President of India* AIR 1982 SC 149 where the Indian Supreme Court states as follows (at p 195, para 25):

> The profession of lawyers is an essential and integral part of the judicial system and lawyers may figuratively be described as priests in the temple of justice. They assist the court in dispensing justice and I can hardly be disputed that without their help, it would be well nigh impossible for the court to administer justice. They are really and truly officers of the court in which they daily sit and practice. They have, therefore, a special interest in preserving the integrity and independence of the

judicial system and if the integrity or independence of the judiciary is threatened by any act of the state or any public authority, they would naturally be concerned about it, because they are equal partners with the judges in the administration of justice.

[46] Encik Christopher Leong further submitted that the Malaysian Bar's concern as to the seriousness of the allegations against the Chief Justice of having holidayed together with Datuk VK Lingam abroad in New Zealand, in terms of the image of the judiciary, must also be judged in the context of the fact that Datuk VK Lingam has appeared as counsel for litigants before Tun Eusoff Chin (either in his capacity as a High Court judge or as Chief Justice) in several court cases, before the alleged holidaying incident as well as after the alleged holidaying incident. Encik Christopher Leong enumerated the cases. They are as follows:

(1) *Kesatuan Pekerja-Pekerja Perusahaan Logam & Anor v The Honourable Minister of Labour, Malaysia* [1991] 3 CLJ 2164;

(2) *Wong Pot Heng & Anor v Kerajaan Malaysia* [1992] 2 MLJ 885;

(3) *Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors* [1995] 2 MLJ 833; and

(4) *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

(5) *Ling Wah Press (M) Sdn Bhd & Ors v Tan Sri Dato Vincent Tan Chee Yioun* [2000] 4 MLJ 77.

DOES THE PLAINTIFF HAVE THE LOCUS STANDI?

[47] Both Encik Christopher Leong and Encik Ranjit Singh for the Malaysian Bar submitted that the plaintiff does not have the locus standi to commence the present action against the Malaysian Bar. Both learned counsel contended that the plaintiff has not offered any evidence to explain his interest in the present proceeding, in particular, to give evidence pertaining to the special damage that he would have incurred if the Malaysian Bar were to be allowed to proceed with the intended EGM. Both learned counsel refer to the following cases in support of their contention:

(1) *Gouriet v Union of Post Office Workers* [1978] AC 435;

(2) *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; and

(3) *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 23.

[48] Encik Vijandran for the plaintiff, on the other hand, submitted that the plaintiff has the locus standi, citing two Court of Appeal cases, namely:

(1) The unreported Court of Appeal judgment in *Majlis Peguam Malaysia dan 2 yang lain lwn Raja Segaran a/l S Krishnan* (Rayuan Sivil No W-02–47 Tahun 2000 and Rayuan Sivil No W-02–48 Tahun 2000) (after this I shall be referring to this case as *Raja Segaran (No 1)*); and

(2) *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15 (after this I shall be referring to this case as *Raja Segaran (No 2)*).

[49] In the first case (*Raja Segaran (No 1)*), at the High Court (do note that in this case that is being cited, the High Court and the Court of Appeal were dealing with a different suit, namely, Civil Suit No S2–23–93 of 1999), the learned judge granted the plaintiff's (the same plaintiff as in the present case) application for an interim injunction to restrain the Malaysian Bar from calling for an EGM scheduled for the 20 November 1999 (this intended EGM is a different EGM from the intended EGM of the present case) to discuss serious allegations of impropriety that had been made against the Chief Justice, Tun Eusoff Chin. An application by the defendant in that case, that is, the Malaysian Bar, to strike out the suit pursuant to O 18 r 19 of the Rules of the High Court 1980 was dismissed by the learned judge, RK Nathan J. Against both decisions of the learned judge, the Malaysian Bar appealed to the Court of Appeal. Both appeals, however, were dismissed by the Court of Appeal.

[50] At the Court of Appeal, on the issue of locus standi, Ahmad Fairuz JCA (as he then was) delivering the judgment of the Court of Appeal said:

> We are satisfied that the respondent, as a Bar member, 'will sustain some special damage over and above that suffered by the general public' if the injunction is not issued. It must, at this juncture, be not forgotten that the respondent is a paying member of the Bar and payments are compulsory. He certainly has an interest in ensuring that the Bar does not involve itself in illegal activities or ultra vires act.

[51] The Court of Appeal in *Raja Segaran (No 2)* concurred with this view.

[52] In the case that is now before this court, it is my judgment that the plaintiff's action against the Malaysian Bar must be dismissed with costs. I so hold because at this trial the plaintiff has clearly failed to show to the court that he has the locus standi to commence the action against the Malaysian Bar. In so holding, I do not think that I need to dwell into the cases cited by counsel of both sides or to go into the complexity of the law of locus standi.

This is because of the peculiarity of the present case as I have explained at the beginning of this judgment; that is that the plaintiff has not come forward to testify or to offer any evidence at all. Now, it must be borne in mind that the basic principle is that the legal burden is on the plaintiff to show that he has the locus standi. Now, in order to do that, he must, as a first step towards establishing locus standi, show that he is aggrieved by the decision of the Bar Council to call for the EGM. And not only that: he must show that the grievance that he has is a 'genuine grievance', that is to say, he would suffer special damage if the EGM were to have taken place. But, then, in order to do that the plaintiff must furnish evidence explaining why he is aggrieved. In the present case, however, the question arises: what has the plaintiff done in order to show to the court that he is aggrieved by what the Bar Council intended to do? To repeat what has been stated at the beginning of this judgment, the plaintiff has been absent throughout the entire trial; and he has not called any witness or to offer any evidence. The only material available before this court is a statement of agreed fact to the effect that he is a member of the Malaysian bar, and thereafter he relies solely on the submission of his counsel from the Bar. But this statement of being a member of the Malaysian Bar by itself does not go anywhere near towards explaining as to why he is aggrieved with what the Bar Council had done or intended to do. And where there is this evidential deficiency, any submission by counsel from the Bar to explain why the plaintiff is aggrieved and what special damage that the plaintiff would have incurred had the intended EGM be allowed to take place, and how that special damage would come about, cannot be of any help to him in terms of establishing locus standi.

[53] Encik Vijandran submitted that the two cases, namely, *Raja Segaran (No 1)* and *Raja Segaran (No 2)* have ruled that the mere fact of being a member of the Malaysia Bar by itself confers locus standi on the plaintiff for the purpose of restraining the Malaysian bar from committing the (allegedly) ultra vires acts. I have carefully examined both the judgments of the Court of Appeal on the issue of locus standi; but with respect I find nowhere in the judgments does the Court of Appeal unequivocally ruled that at the trial no evidence as to the plaintiff's grievance and special damage need to be adduced and that such facts could be established merely by submissions from the bar.

[54] In view of the fact that the present case involves a full trial, and also in view of the peculiar nature of the present case, as explained, that is to say, the absence of the relevant evidence as to locus standi, the two cases cited by learned counsel for the plaintiff, that is, *Raja Segaran (No 1)* and *Raja Segaran (No 2)*, with respect, are, therefore, not of any assistance at all to the plaintiff. And I must add that the judgments of the two Court of Appeal cases cited by Mr Vijandran essentially relate to interlocutory applications at the High Court the hearing of which involves affidavit evidence, including the affidavit

evidence of the plaintiff himself adduced at the time of the hearing of the interlocutory applications, explaining his 'special damage'.

CONCLUSION

[55] In conclusion, I hold that the plaintiff has no locus standi to institute this action. Accordingly, the present action must be dismissed with costs, the interlocutory injunction to be discharged and, pursuant to this discharge, damages (if any) to the defendant, to be assessed.

[56] There are other legal issues raised by the plaintiff in the present case. However, in view of my decision on the issue of locus standi, there is no necessity for me to deal with them.

[57] Be that as it may, there is one issue that I strongly feel compelled to touch upon and that I would be failing my duty as a judge if I do not say what I feel needs to be said in the interest of justice. What I am now going to touch upon is a matter of constitutional importance. It is this. The Court of Appeal in both *Raja Segaran (No 1)* and *Raja Segaran (No 2)* had ruled that the intended EGM of the Malaysian Bar would be contrary to arts 125 and 127 of the Federal Constitution, and that only Parliament can discuss the conduct of a judge.

[58] Article 127 of the Federal Constitution reads:

> The conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

[59] Article 125, cll (2) and (3) of the Federal Constitution states:

> (2) A Judge of the Federal Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.
>
> (3) If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under Clause (3A) or on the ground of inability from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang

A di-Pertuan Agong shall appoint a tribunal in accordance with Clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

B **[60]** In *Raja Segaran (No 1)*, Ahmad Fairuz JCA after alluding to the above provisions and to arts 121 and 124 of the Constitution of India, held:

> What is obvious from these provisions is the fact that both in Malaysia and in India, it is only the Parliament that has been authorized to discuss the conduct of judges.

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[61] The learned judge then alluded to certain passages in the judgment of K Ramaswamy J in the Indian Supreme Court case of *Ravichandaran Iyer v Justice AM Bhattacherjee & Ors* [1995] 5 SCC 457. In particular, there is this D passage that reads:

> Our Constitution permits removal of the judge only when the motion was carried out with requisite majority of both the Houses of Parliament recommending to the President for removal. In other words, the Constitution does not permit any action E by any agency other than the initiation of the action under art 124(4) by Parliament. In *Sub-Committee on Judicial Accountability v Union of India* this court at p 54 held that the removal of a judge culminating in the presentation of an address by different Houses of Parliament to the President, is committed to Parliament alone and no initiation of any investigation is possible without the initiative being taken by the House themselves. At p 71 it was further held that the F constitutional scheme envisages removal of a judge on proved misbehaviour or incapacity and the conduct of the judge was prohibited to be discussed in Parliament by art 121. Resultantly, discussion of the conduct of a judge or any evaluation or inferences as to its merit is not permissible elsewhere except during investigation before the Inquiry Committee constituted under the Act for this purpose. G

[62] Having referred to the passages, our Court of Appeal then came to the following conclusion:

H > We associate ourselves with the above mentioned excerpt from K Ramaswamy J's judgment. The excerpt is clearly in line with logic. What is the point of providing arts 121 and 124 (4) [of the Indian Constitution] [125(2) and (3) and 127 of the Federal Constitution] if the discussions of the judge's conduct can still be held by other forum/fora? To us, it is repugnant to common sense to say that despite the I two articles, other people other than the Parliament can still discuss conduct of judges.

[63] The Court of Appeal does not, however, explain what it meant by 'other people other than Parliament'. Be that as it may, Encik Ranjit Singh for

the Malaysian Bar submitted that *Ravichandran* must be confined to its own facts and that to suggest that the conduct of a judge can never be discussed other than by Parliament is untenable; for it would mean, inter alia, that:

(a) any application for a recusal of a judge can never be made;

(b) one could not have a forum to discuss the achievements of a particular judge, say, for example, Tun Suffian or His Royal Highness Sultan Azlan Shah;

(c) any member of the public whether a lawyer or otherwise cannot have a discussion into the conduct of a judge whether in a private or public forum.

[64] With respect, there is much force in this argument by counsel.

[65] With the greatest respect, I am unable to agree with such an interpretation of art 125, cll (2) and (3) and art 127 as adopted by the Court of Appeal. Article 127 merely provides that Parliament cannot discuss the conduct of a judge except on a substantive motion and subject to certain procedural requirement as to the giving of notice; and that the conduct of a judge cannot be discussed by any State Legislative Assembly. This article imposes a restriction on Parliament and a prohibition on State Legislatures with regard to the power to discuss the conduct of judges. It is the Federal and the State Legislatures that the article is concerned with. The restriction or the prohibition is not imposed on the general public.

[66] As to art 125, cll (2) and (3), these clauses merely provide the procedure for the removal of judges from office and for the appointment of a tribunal for that purpose. This article has nothing to do with the right or power to discuss the conduct of judges either by the Legislatures or by the general public.

[67] Both provisions (ie arts 125 and 127) are meant to protect and preserve the fundamental constitutional principle of the independence of the judiciary and the doctrine of separation of powers to which our Constitution subscribes. With the foregoing understanding of the constitutional provisions, I am unable to agree with the Court of Appeal's interpretation of these two articles to the effect that only Parliament can discuss the conduct of judges. I simply cannot fathom how such a conclusion (with its startling consequences) can be arrived at by the Court of Appeal. With respect, the Court of Appeal's reasoning is far-fetched.

[68] In attempting to rely on the Indian Supreme Court case of *Ravichandran* to support their proposition, the Court of Appeal, with respect,

failed to appreciate two material basic facts. First, the Indian Supreme Court judgment in *Ravichandran* was dealing with provisions of the Indian Constitution which are different from ours. Articles 121 and 124 of the Indian Constitution confer on the Indian Parliament the power to discuss the conduct of a judge with a view to the removal of the judge in question. Article 121 of the Indian Constitution provides:

> No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

[69] Article 124(4) of the Constituion of India stipulates:

> A Judge of the Supreme Court shall not be removed from his office except by an order of the President after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

[70] But our Parliament, unlike the Parliament of India, is not empowered by our Constitution to be involved in the process of removing a judge. While that is so, it is to be appreciated that the Constitution of India does not have provisions similar to either art 127 or art 125, cll (2) and (3) of our Constitution.

[71] Secondly, in *Ravichandran* the Bar Council of Maharashtra and Goa and the Bombay Bar Association were in fact calling for a general meeting to pressure the judge in question, that is, the Chief Justice of the Bombay High Court to resign. Hence the Bar Council and the Bar Association there were attempting to do something more drastic than what the Malaysian Bar Council intended to do in *Raja Segaran (No 1)* and *Raja Segaran (No 2)*.

[72] As the facts and the constitutional provisions in the Indian Supreme Court case of *Ravichandran* are different from the facts and constitutional provisions in *Raja Segaran (No 1)* and *Raja Segaran (No 2)*, to my mind Ravichandran is of no relevance and do not support the view of the Court of Appeal that by virtue of art 127 and art 125, cll (2) and (3), only Parliament could discuss the conduct of a judge, and that no-one else can.

[73] Lest that I be misunderstood, let me reiterate that since I have in the present case held that the plaintiff has no locus standi, the question as to

whether I am bound or not by the Court of Appeal decisions on the issue regarding arts 125 and 127, for the purpose of my decision in the present case, does not arise at all.

[74] Nevertheless, it is my earnest hope that the day will come soon in the very near future when our Court of Appeal or the Federal Court will have the opportunity to revisit the issue and to overrule the decision of the Court of Appeal in *Raja Segaran (No 1)* and *Raja Segaran (No 2)* on the interpretation of arts 125 and 127 of our Constitution in the context of the issue on discussion on the conduct of judges.

[Suit dismissed with costs; interim injunction discharged and damages to be assessed]

Action dismissed with costs.

Reported by Andrew Christopher Simon